60 L. J. Ch. (N. S.) 341; *Nichols* v. *Eaton*, 91 U. S. 716; *Camp* v. *Clary*, 76 Va. 140. Some American courts have followed the English doctrine and have refused to countenance "spendthrift trusts." *Robertson* v. *Johnson*, 36 Ala. 197; *Tillinghast* v. *Bradford*, 5 R. I. 505. But the ever-increasing weight of authority tends towards the view that an equitable interest may be limited in trust for a debtor, and that it shall be free from involuntary alienation at the instance of creditors. *Jourolomon* v. *Massengill*, 86 Tenn. 81, 5 S. W. 719; *Shankland's Appeal*, 47 Pa. 113; *Spindle* v. *Shreve*, 111 U. S. 542. A few jurisdictions have gone to the extreme of allowing an absolute and alienable equitable interest to be placed beyond the reach of creditors. *Boston, etc. Trust Co.* v. *Collier*, 222 Mass. 390, 111 N. E. 163; *Wallace* v. *Foxwell*, 250 Ill. 616, 95 N. E. 985. Other American states have sought a compromise through statutory regulation giving a measure of protection to both the beneficiary and the creditors. *Hardenburg* v. *Blair*, 30 N. J. Eq. 646. See GRAY, RESTRAINTS ON ALIENATION 2 ed., § 286. The instant case is but another aspect of the controversy. *Prima facie*, the owner of property should be allowed to do with it as he pleases, so long as he does nothing illegal or against public policy. But how far shall the law permit him in disposing of it to protect a person who is *sui juris* against himself? Certainly not when it will be more injurious to the one side than beneficial to the other. It cannot be just to permit one man to enjoy wealth to the injury of another. See GRAY, RESTRAINTS ON ALIENATION 2 ed., §§ 137–277.

WILLS — TESTAMENTARY CAPACITY — CAPACITY OF INFANT SOLDIER TO BEQUEATH. — An infant soldier nineteen years of age, made a properly executed and attested will bequeathing personalty. *Held*, that an infant soldier cannot make a valid will under the Wills Act. *In re Wernher*, 34 T. L. R. 191.

For a discussion of this case, see Notes, page 1024.

BOOK REVIEWS

CASES ON FUTURE INTEREST AND ILLEGAL CONDITIONS AND RESTRAINTS. SELECTED FROM THE DECISIONS OF ENGLISH AND AMERICAN COURTS, By Albert M. Kales. St. Paul: West Publishing Company. 1917. pp. xxvi, 1456.

In a recent number of the "Law Quarterly Review" an English reviewer of Shaw Fletcher's treatise on contingent and executory interests vents his impatience by remarking that "until the day comes when the law of real property is abolished, it will remain necessary that some persons should be learned upon the subject of contingent remainders and executory interests." This is unfortunately more than an individual reaction. It fairly typifies a somewhat general attitude among American lawyers toward what two generations ago was at once the delight and the diversion of the more learned members of the profession. Before modern social legislation had begun to compel judges and lawyers to devote so much time to the numerous "non-legal" matters which now all but monopolize their interest, few practitioners had dreamed of "abolishing" the law of real property. Such a triumph as that of developing, out of the conception that there should be no possibility upon a possibility, the rule against a limitation to the unborn child of an unborn child, was one of the important intellectual compensations of the mid-victorian lawyer. Nowhere else has the "jurisprudence of conceptions" held such undisputed sway.

But the modern practitioner finds little time for the subtleties of the law of feudal tenure. Perhaps it is on the theory that what one does not know, one

need not deal with in practice, that he has been content to leave the learning of our law of future interests to the expert and the legal antiquarian. Certain it is that much of this learning has passed out of common ken. Mr. Kales has recognized this in compiling a case-book which as he says, "deals with the subjects of property more commonly met with in litigation, about which lawyers in general know the least, and where academic knowledge and analysis are of great importance in handling cases."

Though the subject has so largely become one for the expert, a tradition seems to have lingered in appellate chambers that every well-read judge is an expert in the field, as a matter of law. A consequence has been that in many states the litigation of future interests questions today faces a most uncertain fate; for one can never tell when a remnant of feudal principle will find its way into a reformed and somewhat modernized system of property law. In a state where much of the lore of feudal tenure has been discarded as out of consonance with modern thinking, one often finds an outcropping of the effects of ancient law — in such a rule, for instance, as that which invalidates any limitation after an absolute gift with a super-added power of disposal. Where legislation prevails, this is particularly true; judicial interpretation is so often made to depend, not upon the satisfactory development of a new system of property law which the legislation has attempted to establish, but upon some survival of the feudal law of estates which, though inconsistent with the new régime, was not clearly excluded by the words of the statute.

A consequence of the neglect of property law by the general practitioner has been its isolation from the course of modern juridical development. During a period when most of our rules have undergone close reëxamination with a view to their better adjustment to the conditions of present-day society, the law of real property has almost escaped attention. In the first place, it has not been a field for legislation since the period of imitative statute-making in the middle of the last century, when so many new states were endeavoring to unshackle themselves from the land law of England. It is a rare thing for one to encounter in the modern session acts any legislation dealing with the law of real property. The Massachusetts Contingent Remainders Act of 1916 is an outstanding and lonely exception. The period of legislation which began with the New York Real Property Law promised for a time to be somewhat general throughout the country, but with the imitation of the New York legislation in Michigan, Wisconsin, Minnesota, North Dakota, South Dakota, and California, it suddenly stopped. Even in these jurisdictions, there is as yet little disposition to scrutinize the legislation with a view to its practical success and satisfaction. One finds important communities still lagging behind most of the country; for instance, the Rule in Shelley's Case still prevails in Illinois, and one must still avoid the pitfalls of an indefinite failure of issue in that state.

But there is a more serious consequence than this neglect of legislation. There has been almost no attempt on the part of the profession to evaluate the rules of property law, with a view to their serviceability either to the owners and managers of property or to society. Doctrine is still the be-all and end-all of juridical effort in this field. The law of restraints against alienation furnishes an illuminating example. We have perpetuated Littleton's interdiction against the "condition that the feoffee shall not alien the land to any," which he put on the ground that it would be against reason to deprive the owner of a power which the law gives him. In modern times, we have acquiesced in this, often avowedly for Littleton's reason, but really because of the social interest in free alienability. Courts still treat the incidents of ownership as if they were fixed and unchangeable for all time, and attempt thus to explain our law of alienability. At the same time, the profession goes on without any serious appraisal of the social and individual interests which it is the function of these legal incidents to protect. Even Mr. Gray, than whom no American lawyer

has been better fitted for the task, did not attempt to determine whether *Nichols* v. *Eaton* was merely "a blot on the escutcheon of the common law," or a "jewel in the crown of the Social Republic." And if free alienation is established as a social principle, we need yet to determine whether it is being adequately protected by the existing rules of law. If one cannot expressly forbid the alienation of a fee simple for a limited time, yet he may by a judicious expression of a condition subsequent or by creating executory limitations accomplish the result substantially and keep within our rules of law.

The rule against remoteness is another doctrine in the application of which we have not inquired into the needs of modern society. We ought to know more about the so-called "policy of the law against the creation of perpetuities." The very statement of it as a "policy of the law" should conjure inquiry. Why do we make it our own policy? On what is it grounded? What real interests does the rule against remoteness protect? What conflicts of interests do the decisions applying it resolve, and why should they be resolved as they are? Are we successful in preventing remoteness, or do we allow the policy to be defeated in some indirect way? In the United States we hold that the rule against remoteness is not applicable to rights of entry for conditions broken, but the English courts do not so limit it. Behind such conflicts there is usually an unavowed survey of social and economic consequences, which seldom gets into the open so far as the printed reports divulge. An advance will be made in property as in other branches of the law when these moving considerations are brought from under cover, when the "real" reasons for results reached are avowed as the "good" reasons for the decisions.

Future study of the law of real property must take into account the economic and social factors which it involves. It should furnish a basis, not merely for ridding our land law of its worthless survivals, but also for whipping it into the service of a modern industrial or agricultural community. Unless this function is performed soon and performed properly, disastrous social consequences may be in store. For it seems probable that land ownership may undergo radical changes in the reconstruction which will follow the war. Indeed, in South Dakota it is already being proposed "that all interests in land in fee simple or otherwise shall be construed to be an ownership only for use and occupation of the owner or his heirs and assigns." The direction of the changes which are to come, and the assurance of their meeting the social demands which lead to them, will depend to a large extent upon the capacity of the legal profession for the appraisal and adjustment of our existing law. We have in some degree reached the end of fruitful analysis — and this progress is in no small measure due to Mr. Kales' own work, to his treatise on future interests and his numerous magazine articles, to his impress as an advocate on the law of Illinois, and to this case-book. Further historical exposition may likewise pass into temporary abeyance. What we need now is an intelligent weighing of the interests affected by the law of real property, a philosophical basis for their evaluation in the light of modern notions of ownership and enjoyment, and the evolution of a system of law which will somehow enable even the most fixed of its branches to become responsive to growth and change. Mr. Kales has indicated these needs with reference to another branch of the law in a notable article on due process in a recent number of the "Yale Law Journal." If we must continue to have a doctrinal law of ownership, we need at least a new substitute for the feudal doctrines. It will be unfortunate if our experts do not devote themselves to this difficult task, and even they will need the coöperation of economists and workers in other fields of social science. If any "abolishing" is to be done to the law of real property, it ought to be done by the experts in the field. But experience would justify the fear that it may be done by outsiders.

It may be doubted whether such a functional treatment should be included

in a case-book, and until Mr. Kales' work had been done the time was ripe for raising the question. Mr. Kales has put a finishing touch on Mr. Gray's classic collection. The historical material in Mr. Rood's and Mr. Gray's collections of cases has been suggestively rearranged. Professor Gray's masterful analysis of cases has been developed in such a way as to make this new case-book much more than the revision which it purports to be; it will be more useful in the class room, and at the same time more indispensable to the practitioner. The compiler of the next case-book in the field might strike out on a new line. He might attempt to perform for the law of real property the service which Mr. Wigmore's case-book has so conspicuously essayed for the law of torts. Such a case-book as Mr. Wigmore's is more needed, perhaps, in the field of future interests than in the field of torts. First-year students just beginning their work may need the standard case-book as a guide to the study of historical development and to careful analysis. But third or fourth year students who have completed, in addition to an institutional course in property, courses on titles and wills are better prepared for a broader study of the law of future interests. Mr. Kales has pointed the way in the direction suggested by including in his case-book the drafts of statutes needed in the state of Illinois, which are given on pages 155, 308, 315, and 535.

The editor might almost have called this an Illinois edition of Mr. Gray's collection of cases. It is no objection even to a general case-book that many of the recent cases are taken from the Illinois reports, for legislation in so many other states has obviated the necessity of such a development of the common-law rules as the Illinois cases have made. But it is unfortunate, even for local purposes, that legislation in other states has been so largely neglected. Not only have few cases under the important New York legislation been given, but the litigation under other statutes has been slighted. This is particularly true in the chapter on "The Statutory Remainder Created by the Statute on Entails." In some places the treatment is likely to mislead the student into thinking that on certain matters there has been no satisfactory legislation in the United States. One is surprised to find a draft of a model statute on gifts upon failure of issue printed without adequate reference to the statutes of other states and the important litigation which has grown out of them.

This localization leads to the suggestion which the editor would doubtless welcome, that editions of Mr. Kales' case-book should be prepared for various other states. The vast difference in the law of property in American jurisdictions would seem almost to necessitate this wherever a course in future interests is being taught. Mr. Hildebrand's Texas edition of Warren's "Cases on Corporations" is a suggestive beginning in the field of local case-books.

Mr. Kales' greatest service in this excellent case-book will probably prove to be his clearing up so many of the soft spots which have been the fighting ground of recent litigation. His chapters on the "Alienation of Contingent Remainders," "Powers in Life Tenants to Dispose of the Fee," "The Rule Against Perpetuities Distinguished from the Rule Which Makes Void Restraints on Alienation and Provisions Requiring a Trusteeship (otherwise valid) to be Effective at Too Remote a Time," and "Effect on Valid Limitation of the Failure of Other Limitations for Remoteness," are valuable analyses for which any worker in the field will be profoundly grateful.

In the report of *Whitby* v. *Mitchell*, it would seem that some reference might have been included to the controversy which has raged in recent periodicals over the doctrine of that case. And it may be questioned whether our case-books should continue to include the oddity of *Wilson* v. *Cockrill* which has had no influence in other states and which has been discarded in the state where it was decided.

To the historical work of Mr. Rood and the analytical work of Mr. Gray, Mr. Kales has given us a valuable addition which should place his case-book

in every law school where the subject is taught and in the library of every specialist in the field. The task of "articulating the major premises" of our law of future interests is now before us, and no one in the country is better qualified to undertake it than Mr. Kales. M. O. H.

JOSEPH H. CHOATE: NEW ENGLANDER, NEW YORKER, LAWYER, AMBASSADOR. By Theron G. Strong. New York: Dodd, Mead and Company. 1917.

The author frankly admits that he has not written a complete biography, but rather a sketch of Choate's public career, based largely on personal acquaintance with him, and on newspaper clippings. In this way much material that might have been lost has been preserved in permanent form, and the result is an amusing book.

Choate was a graduate of the Harvard Law School in the class of 1854, and from 1896 to 1904 was president of the Harvard Law School Association. He was always a loyal friend of the School, and for many years one of the most distinguished of the men trained here. He delighted to recall to the alumni the old days before the case system, in "the golden age." Unfortunately, Mr. Strong's book adds little to our knowledge of that time. "I told him I wanted to get some facts concerning his life at the Harvard Law School. He replied, 'There was nothing of interest there; all we had to do was to go to Holworthy once a day and wear out the seat of our trousers.'"[1] There must be some error here. Choate's room was in Holworthy. Did he get his whole legal education in his room, like the apocryphal student who arrived at Property I, at eleven minutes past the hour, and finding the door locked, wrathfully foreswore all lectures, worked up his courses himself, and won a straight A?

The chapter entitled "The Lawyer" is much the best of the four, and every practitioner will find it enjoyable reading. It contains many hints upon what might be called the craftsmanship of our profession. Young surgeons are in the habit of taking an occasional vacation which is spent in some hospital watching a master-carver at work. Lawyers find little opportunity for such apprenticeship, and perhaps the best substitute is extensive reading of legal biography such as this book. The author has wisely interspersed among the famous trials of Choate's practice, numerous little court-room clashes, so that we watch the advocate from day to day.

"I obtained my knowledge," he said, "from reading at home and fighting in the Courts — principally fighting in the Courts." The chapter is full of fights and good stories and tricks of the trade. Too many tricks, indeed! We are left with a suspicion that Choate's legal victories were sometimes obtained not by the elucidation of the truth, but by making the opposing witness or counsel look like a fool. The plaintiff in a seduction case had made the acquaintance of Choate's client when he assisted her to rise from an icy sidewalk. Choate won "by sheer good humor," as Mr. Strong calls it, getting the laugh on the plaintiff by referring to her as "a fallen woman." After discrediting the testimony of a noted art critic, Clarence Cook, Choate "turned upon him and shaking a quivering forefinger at him quoted in dramatic emphasis: 'False, fleeting, perjured Clarence.'" The famous cross-examination of Russell Sage not only took an unfair advantage of a man who could not hit back, but was hardly a search for relevant testimony at all.

Choate was reluctant to retire because "he did not know where so much fun

[1] Strong, *op. cit.*, 22, 23. Compare the account of the School under Parsons in Choate's Address at the Langdell Dinner of the Harvard Law School Association, 1895.